Public Prosecutor v Chan Peng Fatt

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45-15 OF 1998
CLEMENT SKINNER JC
23 JULY 1999

Criminal Law *— Dangerous Drugs — Trafficking — No proximity between accused and drugs recovered — No exclusivity to place where drugs were found — Knowledge of presence of drugs not proved — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Law *— Dangerous Drugs — Trafficking — Presumption — Possession of dangerous drugs — Whether double presumption applies to prove trafficking — Whether television set can fall within phrase 'anything whatsoever containing' — Dangerous Drugs Act 1952 s 37(d) & (da)*

The accused was charged with trafficking in 51.2g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Evidence was adduced that the accused was found alone in the attic of a house. On a search being conducted, the police recovered from behind a TV set a Milo tin inside which was a plastic packet and another plastic packet wrapped in newspaper. The plastic packets both contained substance which was subsequently analyzed and confirmed to be heroin weighing 51.2g. The prosecution submitted that the evidence of the owner of the house showed that the attic was occupied by the accused alone and that he had been staying there for a few years. The evidence therefore established that the accused had control or custody of the TV set by virtue of which the presumption under s 37(d) of the Act should be invoked so that the accused was deemed to be in possession of the drugs and until the contrary was proved, be deemed to know that he was in possession of 51.2g of heroin. The issue before the court was whether the prosecution had established a prima facie case against the accused in respect of the offence charged.

Held, acquitting and discharging the accused:

(1) The prosecution could not rely upon a double presumption, ie by proving custody or control over the TV set in which the drugs were found, the presumption under s 37(d) was first invoked so that the accused was deemed to be in possession of the drugs and then using that deemed possession to also prove possession for the purposes of trafficking under s 37(da)(1). For an an accused to be 'found in possession' of dangerous drugs within the meaning of s 37(da), there must be an express affirmative finding of possession based on evidence. There cannot be a legal presumption of possession (see p 187G–I).

(2) Apart from the mere presence of the accused in the attic, there was no evidence to connect him to the drugs or to associate him with it. There was even no evidence to show how close the

accused was standing to the TV set when the police first saw him in the attic to establish close proximity. No attempt was made to lift finger prints off the TV set or the Milo tin and plastic packets in which the drugs were found to try to establish that the accused had handled the exhibits nor were fingernail clippings taken from the accused to determine if he had handled the heroin (see p 188H–I).

(3) The evidence established that the accused did not have exclusivity to the attic. Further, there was no evidence to infer that the accused possessed knowledge of the presence of the drugs in the TV set (see p 190B, E).

(4) Having considered the totality of the evidence adduced, there was no evidence, whether of a direct or inferential nature, to arrive at an affirmative finding that the accused was found in possession of the said drugs so as to bring the presumption of trafficking into play to assist the prosecution in proving its case. Accordingly, the prosecution had not established a prima facie case against the accused in respect of the offence charged (see p 190G–I).

(5) The presumption of possession under s 37(d) of the Act can only come into play against the accused if it can first be proved that the accused had custody or control of 'anything whatsoever containing' any dangerous drugs. It is not an ordinary use of the word 'contain' to say that a TV set contains drugs or that a TV set is a container of drugs even though drugs may be hidden in a TV set. Accordingly, the presumption under s 37(d) could not apply to the facts of this case to establish possession of the drugs through custody or control of the TV set (see pp 191B, H–192A).

(6) The Milo tin and plastic packets fall within the definition of 'anything whatsoever containing' drugs. However, there was no evidence that the accused was in custody or control of any of these items and thus the presumption under s 37(d) did not come into play (see p 192B–G).

[Bahasa Malaysia summary

Tertuduh dituduh mengedar 51.2g heroin di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Keterangan dikemukakan bahawa tertuduh dijumpai berseorangan di atas loteng sebuah rumah. Ketika satu siasatan dijalankan, pihak polis telah menjumpai di dalam bahagian belakang sebuah set televisyen satu tin Milo di mana di dalamnya terdapat satu bungkusan plastik dan satu lagi bungkusan plastik yang dibalut dengan surat khabar. Kedua-dua bungkusan plastik tersebut mengandungi bahan yang setelah dianalisa dan disahkan adalah heroin seberat 51.2g. Pihak pendakwa menghujahkan bahawa keterangan tuan rumah menunjukkan bahawa loteng itu didiami oleh tertuduh seorang sahaja dan bahawa beliau telah

menetap di situ beberapa tahun. Oleh demikian, keterangan itu membuktikan bahawa tertuduh mempunyai hak mengawal dan menjaga set televisyen tersebut di mana anggapan di bawah s 37(d) Akta tersebut patut digunakan supaya tertuduh disifatkan sebagai memiliki dadah tersebut dan sehingga sebaliknya dibuktikan, disifatkan sebagai mengetahui bahawa beliau memiliki 51.2g heroin tersebut. Isu yang dihadapkan ke mahkamah adalah sama ada pihak pendakwa telah membuktikan satu kes prima facie terhadap tertuduh berhubung dengan kesalahan yang dipertuduhkan.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Pihak pendakwa tidak boleh bergantung kepada dua anggapan, iaitu dengan membuktikan kawalan dan jagaan ke atas set televisyen di mana dadah tersebut dijumpai, anggapan di bawah s 37(d) telah digunakan dahulu supaya tertuduh disifatkan sebagai memiliki dadah tersebut dan kemudiannya menggunakan pemilikan yang disifatkan itu juga untuk membuktikan pemilikan bagi tujuan pengedaran di bawah s 37(da)(1). Bagi seorang tertuduh itu 'didapati memiliki' dadah berbahaya di dalam maksud s 37(da), perlu wujud satu penemuan pengesahan yang nyata tentang pemilikan itu berdasarkan keterangan. Tidak boleh wujud satu anggapan dari segi undang-undang tentang pemilikan tersebut (lihat ms 187G–I).

(2) Selain daripada kehadiran tertuduh sahaja di loteng itu, tiada keterangan yang boleh mengaitkan beliau kepada dadah tersebut atau untuk menghubungkan beliau dengannya. Tiada keterangan juga untuk membuktikan sejauh mana tertuduh berdiri berhampiran dengan set televisyen tersebut semasa pihak polis pertama kali menjumpai beliau di loteng itu untuk membuktikan kaitan kedekatan. Tiada cubaan telah dibuat untuk mengambil cap jari daripada set televisyen atau tin Milo tersebut dan bungkusan-bungkusan plastik di mana dadah tersebut dijumpai untuk cuba membuktikan bahawa tertuduh telah memegang ekshibit-ekshibit tersebut maupun ketipan kuku jari yang diambil daripada tertuduh bagi menentukan jika beliau telah memegang heroin tersebut (lihat ms 188H–I).

(3) Keterangan membuktikan bahawa tertuduh tidak mempunyai hak eksklusif terhadap loteng tersebut. Tambahan pula, tiada keterangan untuk membuat kesimpulan bahawa tertuduh memiliki pengetahuan tentang kehadiran dadah tersebut di dalam set televisyen itu (lihat ms 190B, E).

(4) Setelah dipertimbangkan keseluruhan keterangan yang dikemukakan, tidak terdapat keterangan, sama ada yang bersifat langsung atau berdasarkan inferens, untuk sampai kepada satu penemuan yang mengesahkan bahawa tertuduh dijumpai memiliki dadah tersebut agar anggapan pengedaran tersebut

boleh digunakan bagi membantu pihak pendakwa membuktikan kes beliau. Oleh demikian, pihak pendakwa tidak berjaya membuktikan satu kes prima facie terhadap tertuduh berhubung dengan kesalahan yang dipertuduhkan itu (lihat ms 190G–I).

(5) Anggapan pemilikan di bawah s 37(d) Akta tersebut hanya boleh digunakan terhadap tertuduh jika ia boleh dibuktikan terlebih dahulu bahawa tertuduh mempunyai kawalan dan jagaan 'apa-apa sekalipun yang mengandungi' apa-apa dadah berbahaya. Bukanlah kegunaan yang biasa bagi perkataan 'mengandungi' untuk mengatakan bahawa suatu set televisyen yang mengandungi dadah atau bahawa suatu set televisyen adalah satu bekas dadah walaupun dadah mungkin disembunyikan di dalam suatu set televisyen. Oleh demikian, anggapan di bawah s 37(d) tidak boleh digunakan kepada fakta-fakta kes ini untuk membuktikan pemilikan dadah melalui kawalan dan jagaan set teltevisyen tersebut (lihat ms 191B, H–192A).

(6) Tin Milo dan bungkusan-bungkusan plastik tersebut termasuk di bawah definisi 'apa-apa sekalipun yang mengandungi' dadah. Namun begitu, tiada keterangan bahawa tertuduh mempunyai kawalan dan jagaan mana-mana barangan tersebut dan anggapan di bawah s 37(d) tidak boleh digunakan (lihat ms 192B–G).]

Notes

For cases on dangerous drugs generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Leow Nghee Lim v R [1956] MLJ 28 (refd)
Ho Seng Seng v R [1951] MLJ 225 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
PP v Aris bin Yunus [1989] 1 CLJ 239 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 2, 37(da)(i)
Evidence Act 1950 s 154

Azamuddin Abdul Aziz (Deputy Public Prosecutor) for the Public Prosecutor.

Jula Singh (*Paramjit & Co*) for the accused.

Clement Skinner JC: The accused Chan Peng Fatt, stands charged with the following offence:

> Bahawa kamu pada 10 Januari 1998 jam lebih kurang 10.30 pagi di rumah No 20, Laluan Rasi Jaya 17, Taman Rasi Jaya, Menglembu, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak telah mengedar dadah berbahaya iaitu 'heroin' seberat 51.2 grams dan oleh itu kamu melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah s 39B(2) Akta yang sama.

At the close of the case for the prosecution. Counsel for the accused submitted that there was no case for the accused to answer to as the evidence did not disclose a prima facie case against him. I now set out what that evidence is.

On 10 January 1998, Chief Inspector Elias Abu Bakar (PW4) of the Narcotics Division, IPK, Perak, received information that a Chinese man was involved in drug trafficking activities in the Menglembu area of Ipoh. At about 9.30am he assembled a raiding party of six policemen consisting of D/Sgt Major Harun, D/Sgt Busra (PW5), D/Cpl Abdul Ghani, D/Cpl Rosli, D/L Cpl Selvaraja and D/L Cpl Tambahan Abdul Rahim. At about 10.30am on the same morning, PW4 and the raiding party arrived at a house indentified as No 20 Laluan Rasi Jaya 17, Taman Rasi Jaya, Menglembu, Ipoh ('the house'). They found the front door of the house open but the entrance had a metal grill across it which was locked. PW4 saw a Chinese male in the hall of the house and after introducing himself as a police officer requested for the grill to be opened which was duly done. The person who opened the grill for the police was later identified as the son of the sister of the accused, one Chen Swee Chun (PW3).

Upon entering the house, PW4 found on the left side of the hallway a room (identified as room no 2 in a sketch plan exh P 15) in which he saw a staircase leading up to an attic. PW4 and his men then went up to the attic where he found the accused in a standing position. PW4 introduced himself to the accused whereafter the whole room was searched. From inside the behind of a Toshiba TV set (exh P 8) PW4 recovered two items: a Milo tin (exh P9) inside which was a transparent plastic packet (exh P12A) containing a substance suspected to be heroin (exh P12B); the other item was a plastic packet (exh P11a) wrapped in the Sin Chew Jit Poh Malaysia newspaper (exh P10). The plastic packet contained a substance suspected to be heroin (exh P11B).

The accused was then arrested by PW4 and along with the exhibits taken back to the Narcotics Office at IPK Perak where a police report identified as Menglembu Report 90/98 (exh P 6) was lodged by PW4. A search list (exh P 13) of all the items seized was also made out at the station. After PW4 had marked the items seized as exhibits, the accused as well as the exhibits were handed over to the Investigating Officer, Inspector Burhanuddin (PW6). Before concluding his evidence-in-chief PW4 demonstrated how he recovered the drugs. He removed the back panel of the TV set and pointed inside indicating where he found the Milo tin and the packet wrapped in newspaper.

PW4 was cross-examined on various aspects of the case as a result of which the following evidence was elicited: there is no door leading to the attic; the staircase leading to the attic is found in room no 2 which has a door; that apart from the TV set, no personal belongings of the accused was taken from the attic; that no incriminating evidence was found on the body of the accused; that on the day of the raid, two other male Chinese were in the house; that he, PW4 did not find out in whose name the TV set was registered when it was seized; that anyone could open the back panel of the TV set.

Inspector Burhanuddin bin Ghazali (PM6) who is the Investigating Officer in this case confirmed receiving from Chief Inspector Elias the police report No 90/98, two big plastic packets (exh P11a and exh P12A), one Milo tin, (exh P9) the Sin Chew Jit Poh Malaysia newspaper (exh P 10) and a Toshiba TV set (exh P 8) together with the accused on 10 January 1998. All these exhibits except for the TV set were put into a steel cabinet which is kept locked and the key to which was kept by PW6. The TV set was kept in his office. On 13 January 1998, PW6 sent the two plastic packets containing the seized substances to the Chemistry Department Ipoh, for analysis and on 5 February 1998 went to the Chemistry Department to collect back these packets as well as the Chemist's report (exh P17) which confirmed the contents of both plastic packets to be heroin with a total weight of 51.2 gms. A copy of the Chemist's report (exh P17) was served on the accused at Taiping prison on 10 December 1998. On receiving the exhibits back from the Chemistry Department, PW6 put them back into the cabinet in his office, from where they were on 17 February 1998 taken out, registered at the exhibit store, given registration number D36/98, and deposited there.

The investigating officer, PM6 visited the house the day after the arrest and seizure. He was accompanied by a photographer Syed Alwee bin Syed Abdul Rahman (PW1) who testified that he took 9 photos at the house (exh P 3A to I) and 4 photos of the seized items (P4 a, b, c and d). PW6 also made a sketch plan (exh P 15) of the inside of the house which shows three bedrooms numbered 1, 2 and 3. The sketch shows that the staircase leading up to the attic is found in room No 2.

PW6 was also subjected to cross-examination on various aspects of this case and as a result of which the following evidence came to light; that the said house belongs to the sister of the accused and his investigations revealed that there are four occupants in the house; with regard to the attic, PW6 agreed that there is no door leading to it and that anyone could go in and come from the attic, that he did not recover any key to the room (no 2) in which the stairwell leading to the attic is located; insofar as the TV set is concerned, he did not try to trace any finger prints on it or any of the other exhibits seized; that no licence was recovered for the TV set and that he had no proof of who the TV set belonged to; that the accused's finger nail clippings were not taken as part of the investigation.

Out of the raiding party of six persons, the prosecution called only Detective Sergeant Busra bin Abdul Kadir (PW5) whose evidence

substantially corroborated that of Chief Inspector Elias (PW4) in all material aspects. In his cross-examination, PW5 agreed that there was no door leading to the attic and that the back panel to the TV set could be opened by anybody.

The prosecution also called as a witness, one Chen Swee Chun (PW3) the sister of the accused who testified that she had been living at the said house for about five to six years together with her husband and three children. The attic of the house was occupied by the accused who would come back to stay in the attic when he was sick. The accused also stayed at their mother's house. PW3 stated that the Toshiba TV set which was in the attic belongs to their mother who had bought it and that the TV set was brought to the house by PW3 herself. When it was first brought back, the TV set was placed downstairs because her son's computer set had not been shifted out from the attic. PW3 stated that the attic had been built many years ago for her son to place his computer in and that to get to the attic one had to go through a room (No 2) which is occupied by her son.

PW3 also gave evidence that prior to his arrest the accused would often be visited by his friends and when they came, they would meet in the attic. About five days before his arrest the accused was visited by three of his friends. On PW3 giving such evidence, the learned Deputy Public Prosecutor (DPP) applied to cross-examine PW3, as a 'hostile witness', pursuant to s 154 of the Evidence Act 1950 on the grounds that she had made a statement to the police under s 112 of the Criminal Procedure Code (CPC) which was contradictory to what she had stated in court in relation to the visit of the accused's friends.

I allowed questions to be put to PW3 to first establish whether she had given a previous statement to the police in connection with her brother's arrest. PW3 acknowledged that she had. The DPP then tendered to the court a copy of PW3's statement with all other parts blocked out except for that portion relevant to the visit of the accused's friends. Having read that portion, I was satisfied that there was contradiction between what was stated there and her oral testimony in court. I accordingly granted permission to the DPP to cross-examine PW3.

On being so cross-examined, PW3 named the three friends who visited the accused five days before his arrest as Ah Choy, Lo Wong and Kai Chai. When asked to describe these friends, PW3 described Ah Choy as about 50 years old and thin but could not give his height. Lo Wong was about 40 years old and of thin build but PW3 could not give his height. Kai Chai was about 40 years old, not tall or short but a little fat. PW3 said she did not know their real names. When it was put to PW3 that in her statement to the police she had said nobody came to the house to meet her brother, PW3 said she did not understand Bahasa Malaysia, which was what her statement was recorded in. PW3 said the police officer spoke to her in Bahasa Malaysia mixed with Chinese. When questioned whether she remembers being asked if anyone came to the house to visit her brother, PW3 said she could not remember. When it was put to her that she had told the police officer taking her statement that nobody came to the house to visit

her brother, PW3 answered that she could not remember and did not understand the question put to her by the police officer. PW3 denied however, on it being put to her, that the three persons Ah Choy, Lo Wong and Kai Chai were fictitious. I wish to state now that I was satisfied as a result of her cross-examination as a hostile witness that PW3's evidence about the visit of these three friends cannot be believed. I found the above answers evasive and contradictory. They show PW3 to be untruthful on this point.

When PW3 was cross-examined by the defence, she was asked only three questions in answer to which she gave the following evidence: the door to the room (No 2) in which the staircase leading to the attic is situated cannot be locked: that access to the attic is by a staircase and there is no door to the staircase.

The only other witness called by the prosecution was Kpl Zainal bin Abdul Hamid, (PW2) who on 7 February 1998 was attached to the exhibit store at IPK, Ipoh and who confirmed having received from PW6 on 7 February 1998 the case exhibits which he recorded in the Register Book, an extract of which was tendered as an exhibit marked exh P7. The exhibits were recorded in the register book under reference D36/98 and consisted of a brown envelope (exh P5) with the seals of Jabatan Kimia, Ipoh No 2, Makmal No (IP) FOR 88/98-0 with the marking CPF another brown envelope (exh P6) with the markings Menglembu Report 90/98, 10 January 1998, with the additional notation of a Milo tin, a piece of newspaper, a wallet and the marking CPF with the name of Insp Burhanuddin bin Ghazali; a Toshiba TV set marked E was also handed to PW2. The exhibits were then kept in the store the keys of which are held by PW2. The exhibits have been taken out of the store on the following occasions for the purpose of this case: 16 January 1999, 2 February 1999, 17 May 1999 and 19 May 1999. On each occasion except for the last, when the exhibits were removed from the store they have been returned on the same date. On the last occasion the exhibits were taken out, they have not been returned because of the ongoing trial. PW2 testified that each time the exhibits were removed from the store it was Inspector Burhanuddin (PW6) who removed them and in doing so signed the register.

What I have set out above constitutes the whole of the evidence for the prosecution and upon which each ingredient of the charge against the accused must be established. To determine as a matter of law whether a prima facie case has been made out, I ask myself whether there is sufficient evidence, which if I were to accept as true, proves each essential element of the offence charged.

The charge preferred against the accused is that he did traffic in 51.2 gms of heroin. Section 2 of the Dangerous Drugs Act 1952 (DDA) contains a definition of 'trafficking' which term includes, inter alia, the act of keeping, concealing, and storing any dangerous drugs. From the evidence led, it is evident that the accused is being charged with trafficking not because he was acting in any of the ways described in s 2, but because the heroin allegedly recovered from him exceeds 15gms in weight by reason

whereof the accused is presumed under the provisions of s 37(da)(i) DDA to be trafficking in the said drug.

Section 37(da)(i) reads:

> ... any person who is found in possession of —
>
> (i) 15 grammes or more in weight of heroin; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drugs.

A reading of the above sub-section shows that for the presumption of trafficking to come into play, a person must first be found in possession of more than 15 gms in weight of heroin. Possession constitutes an essential element of the sub-s and one that needs to be proved. Being fully cognisant of the circumstances in which the drugs were recovered, the prosecution has sought to prove the fact of possession by invoking the statutory presumption found in s 37(d)DDA. This is how the learned DPP put it in submission; from the evidence of PW4 and PW5, when the house was raided, the accused was found alone in the attic; on a search being conducted, the drugs were found inside the TV set which was in the attic; on being analysed by the Chemistry Department, the drugs have been confirmed to be heroin weighing 51.2 grammes; the evidence of PW3 the owner of the house shows that the attic is occupied by the accused alone and that he has been staying there for a few years; the evidence therefore establishes that the accused had control or custody of the TV set by virtue of which the presumption under s 37(d) of the DDA should be invoked so that the accused is deemed to be in possession of the drugs and until the contrary is proved, be deemed to know that he was in possession of 51.2 grammes of heroin.

Section 37(d) of the DDA reads:

> ... any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

I have taken some pains to show how the prosecution hope to establish the charge of trafficking under s 39B(1)(a) against the accused because it is apparent to me that the prosecution rely upon a double presumption or presumption upon a presumption ie by proving custody or control over the TV set in which the drugs were found, the presumption under s 37(d) is first invoked so that the accused is deemed to be in possession of the drugs and then using that deemed possession to also prove possession for the purposes of trafficking under s 37(da)(i).

I regret this is not a course that is now open to the prosecution. In the case of *Muhammed bin Hassan v PP* [1998] 2 MLJ 273, the Federal Court has held that for an accused to be 'found in possession' of dangerous drugs within the meaning of s 37(da) there must be an express affirmative finding of possession based on evidence; there cannot be a legal presumption of possession. In other words, for the purpose of s 37(da), possession must be proved, like any other fact, by cogent and admissible evidence and cannot arise out of legal presumption.

It is with the above in mind that I now consider the evidence adduced to see if the prosecution has proved that the accused was found in possession of the heroin in relation to the charge of trafficking. What constitutes 'possession' in law has been discussed in many cases but a particularly useful discussion on the subject is to be found in the judgment of Thompson J, in the case of *Chan Pean Leon v PP* [1956] MLJ 237 at p 239 where he said:

> 'Possession' itself as regards criminal law is described as follows in *Stephen's Digest* (9th Ed) at p 304:
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> > 'A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of other persons, and when the circumstances are such that he may be presumed to do so in case of need'
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example, have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi.* Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand if it is lying on a table in a room in which I am, but which is also frequently used by other people, then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or have done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found, show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own, had the intention of doing so.

Reverting to the facts of our case, and bearing in mind that the drugs were concealed inside the TV set, can it be said that the accused was so situated to the drugs that he could deal with it as if it belonged to him to the exclusion of all others so as to attribute to him possession of the drugs? I find that apart from mere presence of the accused in the attic there is no evidence to connect him to the drugs or to associate him with it. There is even no evidence to show how close the accused was standing to the TV set when PW4 first saw him in the attic to establish close proximity. PW6 said no attempt was made to lift finger prints off the TV set or the Milo tin and plastic packets in which the drugs were found to try to establish that the accused had handled these exhibits nor were fingernail clippings taken from the accused to determine if he had handled the heroin.

A Notwithstanding that there is no direct evidence of possession, can it be said that the circumstances in which the drugs were recovered, namely, found hidden in a TV set in the attic of which the accused was the sole occupant raise an inference that the accused intended to deal with the drugs as if they belonged to him to the exclusion of all others so as to attribute possession to him?

B Mr Jula Singh, learned counsel for the accused submitted that mere presence of the accused in the attic at the time of the raid is insufficient to pin possession on him. He submits that two things must be shown before possession can in the circumstances be attributed to the accused: (i) that the accused had exclusive possession of the attic to constitute him an occupier C thereof; and (ii) that the accused knew that the drugs were hidden in the TV set. In support of his first contention Mr Jula Singh referred to the case of *PP v Aris bin Yunus* [1989] 1 CLJ 239, a case in which 4367.8 grammes of cannabis was found in a sack as well as a canvas zipper bag in the kitchen of a house in which two persons were found but only one of whom was charged D with trafficking in cannabis. In that case, Shankar J (as he then was) held that mere presence in premises does not make the person present an occupier as there must be sufficient exclusivity of possession of the premises to make a person an occupier. In support of his second contention on knowledge of the drugs, Mr Jula Singh referred to the case of *Choo Yoke Choy v PP* [1992] 2 MLJ 632 in which the Supreme Court held that to E prove custody or control of drugs it must be shown that the accused has knowledge of the drugs. On my part I would refer to the case of *Leow Nghee Lim v R* [1956] MLJ 28, where Taylor J, whilst discussing the word 'possession' stated at p 30:

> Probably the most helpful definition of possession is:
>
> F 'The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.'
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> This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

G I shall now consider the evidence relating to occupation of the attic by the accused to see if it is established that he had sufficient exclusivity of it. The following are uncontroverted evidence from the prosecution's own witnesses:

H (i) there is no door leading to the attic;

(ii) the staircase leading to the attic is situated in room no 2 which is occupied by the son of PW3 and the door of which room cannot be locked;

(iii) that on the day of the raid, there were two other persons in the house;

I (iv) in all, four other persons reside in the said house;

(v) that the attic was where the son of PW3 used to keep his computer and that when the TV set was first brought back from the mother's house

the TV set was kept downstairs as PW3's son's computer was still in the attic; A

(vi) that the back panel of the TV set could be removed by anyone;

(vii) that the accused also lived at his mother's house and would come to stay at the attic when he was sick;

(viii) that friends of the accused used to visit him and when they did they met in the attic. B

The evidence detailed above sufficiently establishes that the accused did not have exclusivity to the attic. What the evidence shows is that the accused occupied the attic periodically when he was sick, that as the door to room 2 could not be locked, it was possible for all four other persons who lived in C the house to gain access to the attic, that the TV set, the behind of which could be opened by anyone was accessible to anybody who had gained entry to the house or was in the house; that the TV set was brought to the house by PW3 from their mother's house and was first placed downstairs where it was obviously accessible to everyone in the house and to any visitors. There D was no evidence led to show when or how recently the TV set was brought from the mother's house and how long it had been downstairs before it was moved to the attic. The significance of this is that the TV set could have only recently been brought to the house and since the back panel of the TV set could be removed by anyone, it is not possible to exclude the possibility that the drugs could have been placed by somebody else in the TV set before E it was put into the attic.

On the question whether the accused possessed knowledge of the presence of the drugs in the TV set, I find that there is no evidence from which knowledge can be inferred because of the following facts:

(i) the drugs were found in the Milo tin and newspaper package which in turn were concealed in the TV set; F

(ii) when the raid was conducted and the drugs recovered, the accused had not reacted in any manner whether by words or deeds so as to indicate knowledge of the presence of the drugs in the TV set;

(iii) there was no evidence to connect the accused with the drugs or to the TV set, as for example his fingerprints being found on the TV set or the Milo tin or plastic packets in which the drugs were contained. G

Having considered the totality of the evidence adduced, even though I was satisfied that the chemist's report (exh PI7) showed the drugs to be heroin, a dangerous drug listed in Part III of the First Schedule to the DDA with a H total weight of 52.1gms, there is no evidence whether of a direct or inferential nature to arrive at an affirmative finding that the accused was found in possession of the said drugs so as to bring the presumption of trafficking into play to assist the prosecution in proving its case. I accordingly find that the prosecution has not established a prima facie case against the accused in respect of the offence charged. I

Notwithstanding the above findings, and whilst the prosecution cannot use the presumption under s 37(d) to also prove trafficking, there is nothing

to prohibit the prosecution from using the presumption under s 37(d) to prove an offence of possession of dangerous drugs under s 12(2) and punishable, in this case, under s 39A(2). As such, it is still incumbent on me to consider the submission of the learned DPP that the accused had the custody and control of the TV set in which the drugs were found and by virtue of s 37(d) is to be deemed in possession of the heroin. I now do so.

The presumption of possession under s 37(d) DDA can only come into play against the accused, if it can first be proved that the accused had custody or control of 'anything whatsoever containing' any dangerous drugs. I draw attention to these words because from the submission of the DPP, it is obvious that he regards the TV set as being something that contains or is a container for dangerous drugs. The question is, can the TV set be considered as coming within the meaning of the expression 'anything whatsoever containing' in para (d). In considering this question, I refer to the case of *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132, where a car was stopped by the Customs Authorities and on a search raw opium was found hidden behind the back rest of the rear seat of the car. The driver and the front seat passenger were charged and convicted of trafficking in dangerous drugs. On appeal, the Federal Court set aside the convictions, and in doing so held that the presumption under para (d) of s 37, DDA had no application to the facts of the case because the car in which the opium was found cannot be held to be 'anything whatsoever containing' the dangerous drugs. In giving his reasons why a car cannot be said to contain drugs or why a car cannot be said to be a container of drugs although opium was found in it, this is what Salleh Abas FJ said at p 133:

> In our view this presumption has no application in the present appeal because the car in which the opium was found cannot be held to be 'anything whatsoever' within the meaning of para (d). This expression 'anything whatsoever' may appear to have a wide import, but its scope and extent is limited by the word 'containing' which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage. Thomson J , as he then was, in *Tong Penq Hong v PP* made a thorough analysis of the scope and application of the presumption under para (d). It is sufficient for us here to refer to that part of the Judgement where he said 'Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction' or, if we may add some measure of confinement.

Keeping in mind the dictum that one should not 'twist and outstretch the language beyond its common usage', can it be said that a TV set contains drugs just as in the ordinary usage of the word, a jar contains jam or as a bucket is a container of water, a TV set is a container of drugs? In my judgement, it is certainly not an ordinary use of the word 'contain' to say that a TV set contains drugs or that a TV set is a container of drugs even though drugs may be hidden in a TV set. In saying so, I refer to the dictum of Thomson J, in the case of *Tong Peng Hong v PP* [1955] MLJ 232 (the decision referred to by Salleh Abas FJ, in *Syed Ali*'s case) that 'a container is not something in which another thing is. It is something which surrounds

or holds another thing so as to prevent that other thing from being elsewhere'. It is my finding accordingly, that the presumption under s 37(d) cannot apply to the facts of this case to establish possession of the drugs through custody or control of the TV set.

The matter does not end there however because the drugs were recovered in two plastic packets, one in a Milo tin and the other in newspaper wrapping. These items ie the Milo tin and plastic packets clearly fall within the definition of 'anything whatsoever containing' drugs so that if the accused can be shown to be in custody or control of any of these items, the presumption under paragraph (d) will come into play.

So, was there any evidence the accused was in custody or control of the Milo tin or the plastic packets? Mr Jula Singh submitted that to establish custody or control under s 37(d), the prosecution must show that the accused had knowledge that the items were in the TV set because without knowledge the accused cannot be said to be in custody or control of them. In the case of *Ho Seng Seng v R* [1951] MLJ 225, Brown Ag CJ said at p 226 that:

> I think that the element of knowledge is implicit in the word 'custody' and in the word 'control'. 'Custody' means watching over or keeping safe. You cannot watch over a thing or keep it safe unless you know it is there. Similarly you cannot have 'control' of a thing unless you know it is there.

I have already earlier in this judgment, when discussing possession, dealt with the question of whether the accused had knowledge of the drugs and what I have said and found there as to why there is no evidence to suggest any knowledge on the part of the accused of the drugs in the TV set will apply with equal force here on the question of whether the accused knew that the Milo tin or the newspaper package or the two plastic packets were in the TV set. Since there is no evidence that the accused was in custody or control of any of these items the presumption of possession under s 37(d) does not come into play. There is no evidence to establish a charge even of possession under s 12(2).

I accordingly acquit and discharge the accused. I also order that the heroin be confiscated and disposed of by the police.

Accused acquitted.

Reported by Jafisah Jaafar